No. 11661

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

HOME INDEMNITY COMPANY OF NEW YORK, a corporation,

*Appellant,*

*vs.*

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, a corporation, *et al.*,

*Appellees.*

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## BRIEF OF APPELLEE STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT.

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JONES, THOMPSON & KELLY,
1017 Rowan Building, Los Angeles 13,
*Attorneys for Appellee Standard Accident Insurance Company of Detroit, a Corporation.*

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## BRIEF OF APPELLEE STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT.

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### Jurisdiction.

Appellee, Standard Accident Insurance Company of Detroit, a corporation, herein referred to as "Standard," is in full accord with the statement in appellant's brief as to the grounds and statutory provisions which sustain the jurisdiction of the District Court to render the judgment herein appealed from and of this court upon appeal to review said judgment.

## Sole Question Involved.

Only one question is involved on this appeal.

*Can an insurer disclaim liability upon the ground of failure of its assured to cooperate, not by proving that the assured gave it a statement showing the existence of certain facts and then later admitted they were not true or testified to a contrary statement of facts, but by using its confidential position to obtain and introduce evidence which, if believed, would prove that the assured's version of the accident was not true?*

## Statement of the Case.

The "Statement of the Case" contained in appellant's brief relating to the issuance of the policies of insurance by the appellant and this appellee and the quoted provisions of each policy found therein is correct. But the appellant's "Statement of the Case" is objected to by this appellee because it fails to include the most vital facts disclosed by the evidence. It is obvious that appellant has included in its statement only those facts which tend to favor its contention and has conspicuously omitted certain important facts upon which Finding Number 7 is based. [R. pp. 177-178.]

It would appear from reading appellant's Statement of the Case, particularly page 7 of appellant's brief, that prior to appellant's counsel tendering (on August 23rd) an answer denying the occurrence of the accident, neither White nor anyone on his behalf advised appellant that he had

fallen asleep and that the accident may have occurred while he was asleep. The evidence clearly establishes that White did so advise appellant prior to July 31st, and, if White's testimony is to be believed, appellant was so advised the same day he made his sworn statement, on the afternoon of July 23rd [R. p. 459], of the fact that he believed he must have fallen asleep and the accident could have occurred while he was asleep.

Appellant also fails to include the following facts:

That its Claims Manager, Mr. Lionel E. Clifton, and its attorney, Mr. Menzies, on July 23, 1946, examined the automobile insured by it [R. p. 388] and that at least Mr. Menzies attended the inquest held in San Diego that day and there questioned a witness. [R. p. 243.]

That Mr. Clifton interviewed witnesses near the scene of the accident the following day and was advised by Mr. Menzies that the automobile had human blood and flesh on it. [R. pp. 402-403.]

That appellant employed a consulting physicist to determine the extent of the physical damage and whether or not the car had collided with some fixed object or with another vehicle or human being. [R. p. 352.]

That White advised appellant's representatives prior to July 31, 1946, that he was going to plead guilty to violating section 480 of the California Vehicle Code [R. p. 383] and that Mr. Holt, his attorney, on July 29, 1946, advised Mr. Menzies the reasons that such a plea was to be en-

tered [R. p. 324], which reasons showed that the plea was not an admission by White that at the time of the accident he was conscious of being involved therein.

That appellant concluded no later than July 31, 1946, that the automobile it insured, and which had been driven by White, struck and killed the two pedestrians. [R. pp. 395-396, 429-430.]

That a discussion relative to a compromise of one of the actions filed in the Superior Court was held on July 30, 1946, between appellants Mr. Clifton, Mr. Barr, of the Barr Adjustment Company, and Mr. John B. Lonergan, the attorney representing two of the heirs. [R. p. 444.]

That appellant's attorney, Mr. Menzies, did not on August 14, 1946 [R. p. 440], believe White would sign an answer denying that he was involved in the accident and that thereafter, on August 15, 1946, he nevertheless submitted to White for signature answers denying White was involved in the accident. [R. p. 125.]

## Summary of Argument.

POINT I.

WHILE THIS COURT OF APPEAL MAY REVIEW THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS OF FACT, THEY WILL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS AND DUE REGARD SHALL BE GIVEN TO THE OPPORTUNITY OF THE TRIAL COURT TO JUDGE OF THE CREDIBILITY OF THE WITNESSES.

POINT II.

THE EVIDENCE CLEARLY SUSTAINS ALL FINDINGS OF FACT ATTACKED BY APPELLANT AND ESTABLISHES THAT APPELLANT WAS NOT MISLED OR PREJUDICED BY ANY STATEMENT MADE BY WHITE, HAVING MADE AN IMMEDIATE AND COMPLETE INDEPENDENT INVESTIGATION OF THE FACTS OF THE ACCIDENT.

POINT III.

THE RESERVATION OF RIGHTS AGREEMENT DID NOT RELIEVE APPELLANT FROM THE DUTY OF ESTABLISHING THE TRUTH OF ITS INSURED'S STATEMENT AND THE DEFENSE OF ITS INSURED WOULD NOT VIOLATE ANY CODE OF PROFESSIONAL ETHICS.

POINT IV.

THERE WAS NO BREACH OF THE COOPERATION CLAUSE AND APPELLANT WAS NOT PREJUDICED BY WHITE'S STATEMENTS.

The chronological sequence of events is important to the decision of this appeal in that it shows how quickly all important facts were disclosed to appellant and how thereafter appellant sought to entrap White into a breach of the cooperation clause of its policy. They are, therefore, set forth in the table below.

### Chronological Table of Events.

July 20, 1946—10 p. m. Automobile accident occurs in San Diego County, fatally injuring Mr. and Mrs. Claude McLester Lee. [231.]*

10:37 p. m. Patrolmen Hake and McCreary received radio call to investigate the accident. [286.]

10:50 p. m. White stopped as he approached San Diego by police officer [268-9] and taken to San Diego police station [270] where the automobile is photographed. [273.]

After 11 p. m. White arrested for violation section 480, California Vehicle Code. [69, 293.]

July 21, 1946—9:30 a. m. White released on bail. [71.]

July 22, 1946—*Fitzgerald, et al. v. White, et al.,* filed in San Diego County Superior Court. [178, Finding No. 8.]

3:00 p. m. Statement of Walter Haggarty, President of named insured, taken at Beverly Hills Hotel by Mr. Menzies. [52, Answer No. 4; 56.]

9:00 p. m. Oral statement given by White to Mr. Menzies and Mr. Clifton. [ 381, 382, 387.]

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*All references are to Transcript of Record.

July 23, 1946—Insured automobile examined by Mr. Menzies and Mr. Clifton [388] and inquest attended by Mr. Menzies [243] and part thereof by Mr. Clifton. [384.]

11:00 a. m. Sworn statement of White taken by Mr. Menzies and Mr. Clifton. [382-3, 58, 77.]

Afternoon—White advised Mr. Menzies he may have fallen asleep and accident may have happened then. [459.]

July 24, 1946—Mr. Clifton interviews witnesses near scene of accident [402, 403] and is advised by Mr. Menzies that the automobile had human blood and flesh on it. [403.]

July 26, 1946—Wm. W. Harper, consulting physicist, hired by Home "to determine the extent of the physical damage, and then at that time to determine whether or not the car had collided with some fixed object or with another vehicle, or human beings." [352.]

Reservation of rights agreement [381] executed by Home and White. [383.]

White advises Mr. Menzies and Mr. Clifton he is going to plead guilty to violating section 480 of the California Vehicle Code. [383.]

July 29, 1946—Attorney Holt advises Menzies reason for plea of guilty. [324.]

July 31, 1946—White pleads guilty. [321, 325.]

August 6, 1946—*Lee v. White, et al.* filed in San Diego County Superior Court. [179, Finding No. 9.]

August 15, 1946—Answers to Superior Court actions against White [107, 116], *denying* White involved in accident, prepared by Mr. Menzies and sent to White for verification. [125, 135, Admission No. 15.]

August 23, 1946—Answers *admitting* White involved in accident [110, 119] are sent to Mr. Menzies [131] and thereafter filed by Mr. Menzies [110 and 134, Admission No. 5; 119 and 135, Admission No. 11]; later Mr. Menzies motioned to withdraw as attorney for White. [434.]

August 26, 1946—Home denies liability in both cases. [157.]

## ARGUMENT.

### POINT I.

**While This Court on Appeal May Review the Sufficiency of the Evidence to Sustain the Findings of Fact, They Will Not Be Set Aside Unless Clearly Erroneous and Due Regard Shall Be Given to the Opportunity of the Trial Court to Judge of the Credibility of the Witnesses.**

Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, is as follows:

> "In all actions tried upon the facts without a jury the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Request for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.* The findings of a master to the extent that the court adopts them, shall be considered as the findings of the court." (Emphasis added.)

Standard contends, and will show, that the evidence abundantly supports the findings of fact and the judgment of the trial court made after it had full opportunity to hear all of the evidence and judge of the credibility of all witnesses who testified in this case. It is submitted that the evidence would not have supported different findings of fact or judgment than those entered.

A. Appellant's Cases Distinguished.

In the case of *State Farm Mutual Automobile Insurance Co. v. Bonacci* (1940) (C. C. A. 8), 111 F. (2d) 412, the court says, at page 415:

> "The facts largely relied upon in this case consist of testimony and written statements given or made by the defendants, not in the presence of the lower court, but in the course of the trial of the damage actions in the state court. The lower court, as to such evidence, had no better opportunity of judging the credibility of the witnesses than does the appellate court."

In the case at bar the witnesses personally appeared before the trial court and it had full and complete opportunity to judge their credibility. It was the duty of the trial court, where it found that there was some conflict in the evidence, to determine which witnesses were entitled to credence and which were not, and to render its findings and judgment in accordance with the testimony and evidence it determined was most worthy of belief.

Appellant, in effect, asks this court to accept the evidence introduced at the trial which tends to contradict the findings and judgment and which was rejected by the trial court. This would be contrary to Rule 52(a) of the Rules of Civil Procedure and the basic rule announced in the cited case.

*Cherry-Burrell v. Thatcher* (1939) (C. C. A. 9), 107 F. (2d) 65, 69;

*Continental Oil Co. v. Jones* (1940) (C. C. A. 10), 113 F. (2d) 557, 564. Cert. denied 311 U. S. 687, 61 S. Ct. 64.

Further, in the *Bonacci* case, the court says, at page 414:

> "The policy also contains the provision that it should be void in the case of any 'fraud, attempted fraud, or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.'"

A careful reading of the policy issued by appellant fails to disclose any provision such as that quoted above. [R. pp. 25-30.]

Also, on page 414:

> "The contract here requires that the insured '*actively* cooperate,' and in that regard this requirement is at least more emphatic and definite than a policy simply requiring that the insured 'cooperate.'" (Emphasis by the court.)

There is no such provision for *active* cooperation found in the policy issued by appellant. [App. Br. pp. 3-4; R. pp. 25-30.]

The other case cited, *MacGowan v. Barber* (1942) (C. C. A. 2), 127 F. (2d) 458, merely announces the rule that on appeal from a judgment in declaratory relief, being in effect a decree in equity, the appellate court may review the facts as well as the law.

## POINT II.

### The Evidence Clearly Sustains Findings of Fact Numbered 16, 17 and 18, Attacked Under This Point, and Which Are Appellant's Specifications of Error Numbered 1, 2 and 3.

The first Specification of Error, and apparently the only one relied upon in the argument under this point, attacks Finding No. 17. It will be shown in subsequent argument by this appellee, under this point and in answer to the other points raised by appellant, that the evidence fully sustains all three findings.

No attack is made on Finding number 7. Finding number 7 [R. p. 177] is as follows:

> "7. The court finds that after the occurrence of said accident, on or about the 23rd day of July, 1946, George White reported said accident to defendant, Home Indemnity Company of New York, but reported that he had not been involved in any accident upon the 20th day of July, 1946, while driving the said Lincoln automobile; that after the 23rd day of July, 1946, and prior to the 31st day of July, 1946, said defendant George White further reported to said Home Indemnity Company of New York that he had fallen asleep while driving said Lincoln automobile on the 20th day of July, 1946, and that the accident in which the aforesaid persons were killed must have happened at that time, and that he, said George White, intended to enter a plea of guilty to a charge brought against him by the People of the State of California that he had failed to stop and render aid at the time of said accident; that thereafter and prior to the 14th day of August, 1946, George White, by and through his attorney, John T. Holt, Esq., did advise the defend-

ant, Home Indemnity Company of New York, that he could not deny that it was the Lincoln automobile driven by him as aforesaid which had struck and killed the said Claude McLester Lee and Leana Mae Osborne Lee, and again advised said defendant Home Indemnity Company of New York that he had fallen asleep and did not know of the occurrence of the accident, but because of the damage to said Lincoln automobile and other facts which were then known to defendant George White and defendant Home Indemnity Company, he believed that it was said Lincoln automobile driven by him which had been involved in said accident and caused the death of said persons.

"The court further finds that all of said reports made by defendant George White to defendant Home Indemnity Company were oral, but that defendant, Home Indemnity Company of New York, requested said oral reports and acted thereon and waived the making of any written report by the defendant George White."

It is submitted that the evidence amply sustains and upholds both findings and that Finding number 7 fully explains Finding number 17. The evidence and the findings clearly establish that appellee, George White, hereafter referred to as "White," on Saturday, July 20, 1946, about 10 o'clock P. M., while driving the Lincoln automobile insured under appellant's policy, became involved in an accident in San Diego County, California. At 10:45 P. M. the same evening White was stopped by officer Cassin as the former was approaching the City of San Diego [R. pp. 286-7] and after some conversation with the officer he was taken, without objection, to the police station in that city. [R. pp. 270-277.] When first

stopped, and at the police station, White denied being involved in any accident and upon arrival at the police station he got out of the automobile, without looking at any damage that had been done to the automobile, as he knew it had been previously damaged that day at the Inglewood Race Track. [R. p. 456.] He went into the police station with the officer. [R. pp. 456, 457.] As he stood in the station doorway he observed pictures being taken of the automobile but did not at that time observe the damage to the car. [R. pp. 273, 284, 373, 457, 458.] There is no evidence that he returned to the automobile or again saw it after being arrested at the police station for an alleged violation of section 480 of the California Vehicle Code. [R. p. 458.]

A. Appellant Not Misled by White's Statement That He Did Not Know He Was Involved in an Accident.

On July 23, 1946, White gave a sworn statement to Lionel E. Clifton, Claims Manager for appellant, and Thomas P. Menzies, one of its attorneys, that he had not been involved in an accident and the automobile he was driving had not struck anyone "that I know of." This was repeated at least three times. [R. p. 53, Ans. No. 10; pp. 67-68.] The previous day he had made an oral statement to the same effect. [R. p. 387.] White also stated to Mr. Menzies and Mr. Clifton that he had been arrested for having been involved in the automobile accident in question and informed them of all of the details and accusations leading up to and surrounding the formal arrest. [R. p. 53; Ans. No. 10; pp. 70-71.]

Appellant contends that these were false, conflicting, misleading and inconsistent statements of fact in view of White's subsequent statement that, from evidence later brought to his attention (including photographs of the automobile and the fact that blood, flesh, and the imprint of clothing were found on it [R. pp. 459-460]), he concluded that his automobile must have hit the pedestrians, although at the time of the accident he had no knowledge of having hit them. Clearly, these statements by White were not false or conflicting or misleading or inconsistent because in answer to appellant's question he repeated three times, explaining, "Not that I know of." [R. p. 53; Ans. No. 10; pp. 67-68.] This conclusively shows that White merely stated that which was in his mind at the time, that is, no consciousness of having been involved in the accident. This statement and the later explanation amount to a statement: "I had no accident that I was conscious of, but I did fall asleep, and the damage to my car and the fact that blood and flesh were found on it and the imprint of one of the pedestrian's clothing found on it demonstrate to me that I did strike these pedestrians and therefore it must have occurred when I was asleep."

Appellant was advised by White after he had obtained knowledge of further facts that he believed that the accident could have occurred while he was asleep. *There is positive evidence in the record that White did notify appellant of this fact on the afternoon of July 23rd, following the giving of the sworn statement referred to above.* White testified that at the time he made his oral report and at the time he gave his sworn statement, he had not yet seen any pictures of the damage to the car

and that he first saw them on the afternoon of July 23rd, testifying:

> "Q. About when? A. I think it was the same day I gave the statement with the reporter there. *I think it was later that afternoon that Mr. Menzies showed me the newspapers that had the pictures of the car in it, and the minute I saw those pictures I said, 'The car was not damaged in that manner, and if that is the car that hit them, it must have happened when I fell asleep.'*
>
> Q. *Did you then tell them that you fell asleep?* A. *Yes, sir.*" [R. p. 459.] (Emphasis added.)

White testified that he again advised Mr. Menzies and told Mr. Watt, another attorney for the appellant, and Mr. Clifton, in Mr. Menzies' office in Los Angeles, on July 26, 1946, "about having fallen asleep and that I wanted to insert that in there, in that transcript, and he didn't seem to want to do that." [R. p. 466.] The transcript referred to is the sworn statement given by White on July 23, 1946, to Mr. Menzies and Mr. Clifton in San Diego.

Further, Mr. John T. Holt, the attorney representing White in the criminal proceedings arising out of the accident, testified that between July 26 and July 31, 1946, he had a telephone conversation with Mr. Thomas P. Menzies. *Mr. Holt at that time advised Mr. Menzies that White claimed he must have fallen asleep* and further:

> "Then I said, 'By the way, how about that transcript? He wants to change that statement.'
>
> And Tom said, *'Oh, no,' he said, 'We have got him over a barrell.* He didn't tell us he fell asleep in the written statement.'

I said, 'He told you the next day.'

He said, *'That doesn't make any difference,* you haven't read the case,' and he gave me some case, which I didn't read, although I might have become better versed in the law if I had, and I said, 'Tom, I haven't read the case, but you don't mean to tell me if you aren't prejudiced at all, and if you knew a particular phase after the first statement was given, and the first statement is given when a man is excited and shocked, that you wouldn't permit him to change it?'

He said, 'I have got the law, and you better read it.'" [R. pp. 322-323.] (Emphasis added.)

Mr. Thomas P. Menzies testified that *on July 29, 1946,* attorney Holt had advised him, "I am telling you now that he must have fallen asleep and he might have hit them while he was asleep" [R. p. 422], and asked that this be incorporated in White's first sworn statement. [R. p. 423.]

When asked the specific question by counsel for this appellee, "Didn't he say that White said that, *that he had fallen asleep?"* Mr. Menzies replied, "He may have. I am not sure of that. *Yes, I think he did,* Paul," and I said, 'Well, that is diametrically opposed to what he told us.' I said, 'He denied to us that he was never in an automobile accident.'" [R. p. 422.] (Emphasis added.)

### B. Appellant Makes Immediate and Complete Investigation of Accident.

The record is replete with evidence that immediately upon being notified of the happening of the accident appellant, on July 22, 1946, took a written statement from Mr. Walter Haggerty, one of the named insureds [R. pp.

52, 56] and president of the other named insured Northumberland Mining Co. Mr. Menzies and Mr. Clifton, on the same day, went to San Diego for the purpose of securing, and did secure, a statement from White. A further statement was given by White the next day. [R. pp. 58, 77.] They inspected the automobile involved in the accident before taking the sworn statement [R. pp. 387-8] and attended the Coroner's inquest July 23, 1946, at least to the extent of Mr. Menzies questioning one of the witnesses. [R. pp. 243, 384.] They proceeded to investigate the facts and circumstances of the accident, including the taking of statements on July 24, 1946, from witnesses near the scene of the accident. [R. p. 402.] They did everything that could be undertaken in order to be fully advised, including the employment on July 26th of one William W. Harper, a consulting physicist, "To determine the extent of the physical damage, and then at that time to determine whether or not the car had collided with some fixed object or with another vehicle, or with human beings." [R. p. 352.] *Appellant did not disclaim liability until August 26, 1946.* [R. p. 157.]

### C. White's Plea of Guilty Did Not Alter the Appellant's Relation to Its Assured.

Appellant contends in its brief (App. Br. p. 27) that it was particularly prejudiced and the cooperation clause of its policy was breached by White's plea of guilty to the charge of violating section 480 of the Vehicle Code of the State of California. It also contends that this plea constituted an admission by White that he had knowingly struck and injured the pedestrians.

Appellant was advised as early as July 26th that White intended to plead guilty to the criminal charges [R. pp.

383, 420, 461.] On July 29th John T. Holt, the attorney representing White in the criminal action, advised Mr. Menzies that he was going to have White plead guilty to the hit and run charges for the reason that if he did so the District Attorney would move to dismiss the manslaughter charges and would not oppose probation, and, further, he (Mr. Holt) felt that many times notable or prominent people did not receive a fair jury trial and that jurors were oftimes prejudiced against them. [R. p. 324.] White testified in the court below as to his reasons for pleading guilty to the criminal charge. [R. p. 463.] Before the plea was entered appellant was fully aware of the reasons for pleading guilty to the criminal charge. [R. p. 324.]

The fact that White pleaded guilty to the criminal charge would have, if left unexplained, undoubtedly constituted evidence of the admission by him that he knew the accident had occurred for knowledge that an accident had occurred was an essential to the crime to which he had pleaded guilty. But the inference thus raised is not conclusive, and the evidence here shows without dispute that White pleaded guilty solely on the advice of his attorney and because his attorney believed (1) that he could secure a dismissal of the manslaughter charges (in which he was successful) [R. p. 327] and (2) because it was his attorney's opinion that a jury would not believe White's story (although he himself believed it) and that a jury is oftimes prejudiced against notable or prominent people, and (3) if the State were put to the expense of a jury trial, the court might be more severe, and (4) he felt that probation could be secured if a plea of guilty were entered. [R. p. 463.] *The inference, therefore, which might otherwise be drawn from the plea of guilty is entirely dispelled.*

D. There Being No Breach of the Cooperation Clause Appellant Can Show No Prejudice.

How can it be seriously contended that appellant was misled or in any manner prejudiced by any statement of fact given by White? Appellant has not pointed to any evidence in the record, and there is none to be found, that would substantiate such a claim. If appellant had been misled or prejudiced certainly it could have offered evidence to establish that fact. It offered none. To the contrary, it presented only evidence which establishes a full compliance by White with the conditions of the policy and particularly the cooperation clause thereof. Its effort to show imaginary inconsistencies in White's statements is not material in this action as whether or not any inconsistency existed would be a matter to be determined in the State court, if it ever became an issue, and not upon this appeal.

Appellant admits it knew the proper persons with whom to negotiate a compromise [R. p. 441] and it has been demonstrated appellant made a full investigation of all of the facts of the accident. The activities of the appellant indicate a plan or scheme to find some loophole by which it could escape its just burden and obligation. All of the acts, conduct and efforts of the representatives of the appellant following the taking of the statement on Juy 23, 1946, unerringly point to an endeavor by appellant to secure evidence to prove that White was mistaken at the time he gave his oral report on July 22, 1946, and the sworn statement on July 23rd, rather than an endeavor to substantiate his theory as to how the accident

occurred. And all this while the insured believed the insurer was protecting his interests under its obligation to "defend in his name and behalf any suit against the insured . . ." [Insuring Agreement II; R. p. 26.] Clearly under the facts as revealed by the record in this case appellant cannot be relieved of its just duty to defend and indemnify White in the actions now pending in the Superior Court of the State of California in and for the County of San Diego. Its duty is to defend its insured or compromise the litigation.

This court certainly will not place its stamp of approval on the conduct of the appellant. To do so will be to permit any insurance company to receive a report from its assured as to the fact that an accident had occurred and then turn around and use its position and facilities to investigate in order to secure only evidence that would contradict the assured's statements and which, if believed, would make the assured's version untrue and then claim lack of cooperation. The insurer could never be the loser, if that is to be permitted. Did appellant perform its part of the insurance contract? No. How can it justly claim it has no obligation or owes no duty to White?

Appellant in effect accuses White of bad faith by his failure to advise it, when he first talked to Mr. Menzies and Mr. Clifton that he had fallen asleep and the accident may have occurred at that time even though he did so advise appellant the next day or at most a few days thereafter. But the record reveals exactly the opposite and

indicates that appellant rather than White was guilty of bad faith, because the important events occurred in the following sequence:

(1) White made an initial statement to appellant on July 22-23, 1946.

(2) Almost immediately thereafter appellant was advised of the fact that White may have fallen asleep and the accident occurred then.

(3) Appellant made an immediate and complete investigation of the accident.

(4) Then appellant prepared for White's signature a non-waiver agreement and reservation of rights, which was executed by both parties.

(5) Appellant concluded the automobile it insured was the one involved in the accident.

(6) Appellant then tendered false answers to White, knowing them to be false and believing that White would not sign them, in that they denied that White was involved in the accident. [R. p. 398.]

(7) Truthful answers, admitting the occurrence of the accident were executed by White and forwarded to Mr. Menzies on August 23rd and soon thereafter filed by him.

(8) After White's refusal to execute false answers appellant denied liability under its policy, on August 26, 1946, over a month after the date of the accident.

(9) Mr. Menzies withdrew as counsel for Mr. White.

## POINT III.

### The Reservation of Rights Agreement Did Not Relieve Appellant From the Duty of Establishing the Truth of White's Statement.

The agreement of non-waiver and reservation of rights [R. p. 171] was executed July 26, 1946. It merely provides that neither White nor Home, by execution of the agreement or further investigation by Home, waived or invalidated any right which either may have under the policy. This is not an unusual form of agreement or method to follow where there is some question in the insurer's mind as to some possible breach by the assured of one or more of the conditions of the policy. It merely means, as its terms show, that the determination of whether there has been a breach or not will be postponed until some future date.

All other rights, duties, obligations and relations between the insured and the insurer remain the same as if no breach were ever claimed. It was, therefore the duty and obligation of Home to proceed with its investigation and to attempt to establish the truth of White's assertions and to represent his interests in every way and with the same enthusiasm as if no breach had been claimed.

The confidential relationship existing between White and the representatives of Home continued after the execution of the reservation the same as it did before. Certainly, until the Home had expressly and unequivocally notified White to the contrary, he had every right to believe that every action taken by Home would be in the

protection of his interests and in the establishment of his defense rather than the contrary, and, further, that counsel and agents furnished by Home would in fact as well as in theory act as his representatives and not adverse to his interests. To hold otherwise would be to permit the insurer to lead the insured into a sense of false security by believing that everything was being done to protect his interests, little realizing that in fact the insurer was doing everything it could to completely discredit him and prove his statement to be untrue and then to claim that there was no liability or obligation under the policy because of the insured's conduct.

That White had ample ground for such a belief is shown by his testimony, as follows:

> "Q. When they came to see you in San Diego, what did they say as to whom they were representing, or what their capacity was when they called on you? A. You mean when I first saw them in San Diego?
>
> Q. Yes. A. That I remember distinctly, Mr. Menzies, saying, 'We are here to help you.' He said, 'You couldn't hire me for a million dollars, but we are here to help you all we can,' and so forth, 'and we are very, very cordial.' And we talked and talked about the accident. * * *
>
> Q. By Mr. Nourse: Please, Mr. White, what did he say? A. That they were going to help me all they could, and look after the case, look after my interests in the case." [R. p. 465.]

In *Pennix v. Winton* (1943), 61 Cal. App. (2d) 761, 145 P. (2d) 561 (hearing denied by Supreme Court), counsel employed by the defendant's insurer became convinced before or during the trial of a damage action that

the insured and the plaintiff were in collusion and that the insured was desirous of having the plaintiff (insured's guest passengers) recover damages. Throughout the trial and during the argument to the jury the acts and conduct of counsel clearly indicated that he did not believe his client and that there was collusion. In granting a new trial upon the ground of such misconduct, the court says, at pages 774, 775:

> "Counsel cannot serve two masters and he can only properly represent the defendant so long as his duties as counsel for defendant do not conflict with his duties as counsel for the insurance carrier. . . . On the question under discussion, we are of the opinion that counsel for defendant was guilty of misconduct in continuing to act as counsel for defendant while acting, as above indicated, and as admitted by counsel, solely in the interests of the insurance carrier."

There is in reality no valid distinction between the case at bar and the cited case. The defendant in both cases had every right and reason to believe, until notified to the contrary, and until counsel furnished by the insurance carrier had withdrawn from the case, that every effort would be made to substantiate and advance his defense rather than to tear it down. The fact that counsel furnished by Home withdrew after August 23, 1946, over one month after the accident, is no justification for appellant's prior efforts to disprove White's version of the accident. It is elementary that once an attorney has accepted the defense of an action it is his duty to represent solely the interests of his client.

A. Defense of White Would Not Violate Professional Ethics.

One of the arguments advanced under this point is that the findings impose upon appellant the duty of maintaining a defense for White based upon his statement, regardless of the opinion of the appellant as to its credibility. Appellant claims that to defend when it did not believe the statement of its assured might result in having its counsel violate the provisions of section 6068 of the Business and Professional Act of California, subsection (c), and the Canons of Professional Ethics of the American Bar Association and of the State Bar of California, on the ground that a legal or just defense, or one honestly debatable, is not available in the opinion of appellant and its counsel. Is the insurance carrier to be the one that finally determines whether the assured's story is to be believed or not believed, or is that to be left to the trier of fact after a full and complete hearing of all of the evidence in the case?

The duties imposed upon counsel and referred to under this point do not prevent an attorney from defending actions such as have been commenced against White in the Superior Court. If a jury should accept his statement as true, that is, that he was asleep at the time of the accident, such an admission would not be conclusive proof of any negligence on his part. At most, it would establish only a *prima facie* case of negligence and call for an explanation or justification.

> *Cooper v. Kellogg* (1935), 2 Cal. (2d) 504, 509, 42 P. (2d) 59;
> *Bushnell v. Bushnell* (1925), 103 Conn. 583, 131 Atl. 432, 44 A. L. R. 785.

Further, there may exist a good defense of contributory negligence as the evidence is without conflict that

the deceaseds were crossing the highway at a point outside a marked or unmarked crosswalk [R. p. 245], and under such circumstances it was their duty to yield the right of way to the automobile operated by White.

*California Vehicle Code,* Sec. 562; Calif. Stat. 1931, Ch. 1026, Sec. 47, p. 2127.

There is also in the record an indication that appellant could produce evidence that the deceaseds were intoxicated at the time of the accident. [R. Tr. p. 320.] If it were true that they were intoxicated, it would be very material in determining the rights of their heirs to recover in the actions commenced against White.

*California Vehicle Code,* Sec. 565; Calif. Stat. 1939, Ch. 786, Sec. 1, p. 2315.

Appellant makes a great deal of the fact that White pleaded guilty to violating section 480 of the California Vehicle Code. This fact could only be received in the civil trials as an admission against his interest and *not as a judgment establishing the fact.*

*Longsley v. Obert* (1933), 129 Cal. App. 214, 218, 18 P. (2d) 725.

It is not inconsistent with his statement that he must have fallen asleep and the accident happened when he was asleep. He at no time told appellant he stopped at the scene of the accident or performed any of the other acts required by that section. In any event, it would appear that as long as the insured acts in good faith the insurer cannot dictate what plea shall be entered to a criminal charge.

Even the evidence adduced by the appellant at the trial corroborated White to the extent that it was proved be-

yond contradiction that a Lincoln automobile at the scene of the accident, with a broken left headlight, *came almost to a stop* and then continued on down the highway, when appellant's witness Raymond C. Cochran testified as follows:

> "Q. Tell us what you saw the car do? A. It almost stopped. It slowed down very slow, and just as it came even with my station it speeded up a little bit, and passed on by." [Rep. Tr. p. 379.]

White testified that:

> "When I got to San Clemente, I stopped at this drive-in and had two cups of coffee. I drove on. The next thing I knew my car was almost slowed down. Suddenly I realized I had been unconscious, or asleep, or something. I grabbed myself together, had to put the car in low gear to get it going again, and continue on my way." [Rep. Tr. pp. 453, 454.]

Finally, Dr. Victor Parkin, the medical expert called by appellant, although testifying that he did not believe White could pass through such an accident without being aware of it, admitted that it takes as much as a second for an individual to orient himself after having fallen asleep and lost consciousness, and that if one is awakened to full consciousness by shock and stimulus or force, there is apt to be confusion in regaining consciousness. [Rep. Tr. p. 367-368.]

Can it be said White had no defense that appeared to be "legal or just" or "honestly debatable?" Certainly not. *Whether the jury would accept it or not is not the point.* There are daily many defenses urged which are believed adequate by all interested in the defendant's case but not accepted by the trier of fact. If appellant was convinced the litigation could not be successfully defended it was then its duty to try to compromise the claims. It was fully advised of all the facts.

## POINT IV.

### There Was No Breach of the Cooperation Clause and Appellant Was Not Prejudiced by Reason of White's Statements.

Appellant in its brief does not claim that it can escape liability in the absence of prejudice. It tacitly concedes that the mere breach of the cooperation clause will not relieve it from liability unless prejudice results. It asserts, however, that if there is a substantial breach, prejudice is implied, and relies chiefly upon certain decisions of the Supreme and Appellate Courts of the State of California.

#### A. Valladao Case Distinguished.

The main case relied on is *Valladao v. Fireman's Fund Indemnity Co.* (1939), 13 Cal. (2d) 322; 89 P. (2d) 643. The facts in that case clearly differentiate it from the case at bar. There the insured had reported that he was not present in and driving the automobile at the time the accident occurred. He repeated this assertion on numerous occasions and verified an answer which denied that he was driving the insured automobile. But *after* the answers were filed and the case was ready for trial he retracted this statement and admitted that he was the driver of the automobile and had told his false story because of certain prior convictions of traffic laws. The Supreme Court of California held first, that the false statement was a breach of the cooperation clause of the policy, and further held that the facts disclosed by the evidence in the case before it showed as a matter of law that the company had been prejudiced. It based its holding, that under the facts proved the company was prejudiced, because, having acted upon the false statement and having filed an answer verified by its insured,

which was false, it could not after the true facts were told it by the assured continue with the defense of the action without entirely reversing its position and filing an answer admitting facts that it had theretofore denied.

How can appellant seriously contend that the facts in the case at bar resemble in the slightest degree the facts in the *Valladao* case? As pointed out by the Supreme Court in the *Valladao* case, at pages 333-334:

> "The insurance company had taken a formal position as to the facts from which it could not recede without great disadvantage. The answer bearing all the forms of verification was on file. The false statements had been made to the traffic officer, the investigator and others. A false plea had been entered before the justice and a false writing subscribed as a report. When the true facts were disclosed, the company had to exactly reverse its position with regard to essential facts and virtually proclaim their parties and chief witnesses to be liars and wholly unworthy of belief. Practically its only props were struck from under it. Better a great deal that there had been an absolute refusal to tell the facts at all than that it should have been deceived into taking a false position and then suffering the disadvantage and detriment of confessing it, thereby utterly destroying the credibility of the principal witnesses to the facts upon which it relied in defense."

No such situation exists in the case at bar, for at the time defendant Home Indemnity Company was required to file answers in the state court actions in behalf of White it was fully advised that it was White's car which had struck the pedestrians. In the present action the Home admits that it was White's car that struck the

pedestrians, and both Mr. Menzies and Mr. Clifton testified that they had ascertained all of the facts which were proven by the Home in the case at bar and which establish that it was White's car that struck the pedestrians, prior to the time the answers were due. [R. pp. 395, 396, 429, 430.] They knew that White had pleaded guilty to hit-and-run driving. They knew the reasons that impelled him to plead guilty (this they had been told by Holt), and they knew that White claimed that he had fallen asleep and believed that the accident might have occurred during that time. The answers which were filed admitted the happening of the accident and there was therefore no issue upon that point to be tried in the state court actions, and the collateral issue as to whether White was asleep and did not know that an accident occurred or knowingly fled the scene of the accident (if that ever became an issue) could be tried as a question of fact to the jury upon conflicting inferences. *Under this situation the Home was not faced with being met at the trial by a statement of facts from its assured other than that which it had theretofore been given, but was in the same position as if all of the facts above related had been brought home to it in its first conference with White.*

Standard thinks it is relevant here, however, to point out that if White had acceded to the demands of the Home Indemnity Company, the very situation which was present in the *Valladao* case might have been present in this action. The evidence is unconflicting that the Home, after it discovered all of the evidence which proved beyond a question of a doubt that it was the car insured by it and driven by White which collided with the pedestrians, upon which facts it has itself in this action admitted the oc-

currence of said accident, tendered to White for verification by him answers which would have *denied* the occurrence of the accident. If these answers had been verified by White and filed by the Home, White would have found himself in the position of having denied an allegation which he knew to be true and having laid himself open to the charge by the Home that he had misled it by verifying a false answer and thus leading it to defend actions which it might otherwise have settled.

This appellee contends that the evidence in this case clearly points to the fact that it was the purpose of the appellant Home to create just such a situation and to attempt to bring itself within the decision of the *Valladao* case. It believes that this inference is one properly, if not necessarily, drawn from the following evidence: Immediately after the occurrence of the accident Home commenced its investigation, and by July 31st had acquired evidence which irrefutably established that it was its insured's car which was involved in the accident. [R. pp. 395, 396, 429, 430.] It was by then advised that White had fallen asleep and that the accident might have occurred during the time he was asleep. In fact, that was the only time it could have occurred, if White's statement that he did not know an accident occurred is true. It then had in its possession knowledge of all of the facts from which it now seeks to draw the inference that White's statement was false, but it did not deny liability or withdraw from the defense of the actions. It caused answers to be prepared which denied directly (not even for want of information or belief) the occurrence of the accident, and forwarded these to White to be signed, calling his attention to the fact that they were in accordance with his "sworn statement" [R. pp. 107, 116, 125], although at the

same time it expressed the opinion to Mr. Lonergan, attorney for the appellee Lee, that it did not believe White would sign the answers. [R. p. 440.] It was advised by Holt that White could not verify an answer which denied the occurrence of the accident. [R. p. 330.] The only logical inference that can be drawn from these facts is, first, that Home did not believe that it had a right to deny liability solely on the basis of the inferences to be drawn from the evidence which it had collected, and, second, that it desired to place its assured in the position of failing to cooperate by inducing him to sign an answer which it knew to be false, or to place him in the position of failing to cooperate by refusing to verify an answer which its agents, themselves, did not believe to be true and which was not in accordance with White's *full* statement to them, although in accordance with some of his answers in his original sworn statement.

The court will remember that before these answers were tendered, Mr. Menzies called Mr. Holt's attention to a decision, presumably the *Valladao* case [R. p. 323], and it is very probable that Mr. Menzies not only had that case in mind but the cases which hold that an assured fails to cooperate when he refuses to verify an answer which presents a defense borne out by provable facts, although he must have overlooked those cases which hold that an assured need not verify an answer which is sham and which contains denials which assured knows to be untrue, that is, he need not combine with the insurer to present a sham defense.

*Valladao v. Fireman's Fund Indem. Co.* (1939), 13 Cal. (2d) 322, 329, 89 P. (2d) 643, *supra;*

*Pacific Indemnity Co. v. McDonald* (1939), (C. C. A. 9), 107 F. (2d) 446, 452;

*Royal Indemnity Co. v. Morris* (1929) (C. C. A. 9), 37 F. (2d) 90, 92, cert. denied 281 U. S. 748, 50 S. Ct. 353;

*Coleman v. New Amsterdam Cas. Co.* (1928), 247 N. Y. 271, 160 N. E. 367, 72 A. L. R. 1443.

B. Appellant's Other Cases Distinguished.

Appellant also cites and relies on *Margellini v. Pacific Automobile Insurance Co.* (1939), 33 Cal. App. (2d) 93, 91 P. (2d) 136. This case does not involve a question of false statements by assured, but involves a failure by assured to make any report whatsoever of the accident despite the efforts of insurer to secure one. Here, in the case at bar, there is no complaint that White did not make a report. The only complaint is that his original report was amplified before it was acted on by the Home by stating to the Home the true fact that White was asleep and that from the facts he had learned believed that it was his car that had caused the deaths of the two pedestrians.

Appellant also relies on *Wright v. Farmers Automobile Inter-Insurance Exchange* (1940), 39 Cal. App. (2d) 70, 102 P. (2d) 352. This case did not involve a trial of the issue as to whether or not assured's testimony was true, but on the contrary assured gave to his insurer one version of the accident and then at the trial testified to entirely different facts, and the court properly held that either his first statement was true and that he failed to cooperate by testifying falsely at the trial, or that his first statement was untrue and that he failed to cooperate by misleading his insurer *until the time of trial.* There are no such facts in the case at bar.

Appellant also relies on *Buffalo v. United States Fidelity & Guaranty Co.* (1936) (C. C. A. 10), 84 F. (2d)

883. This case reached the appellate court upon pleadings only. A careful examination of the cited case and its companion case, *United States Fidelity & Guaranty Co. v. Wyer* (1932) (C. C. A. 10), 60 F. (2d) 856 (cert. denied 287 U. S. 647, 53 S. Ct. 95, 77 L. Ed. 500), shows that the decision of the court was based upon the fact that the pleadings showed that the assured had reported to the insurer that he was not in the insured automobile at the time of the alleged accident, while the pleadings admitted that he was in that automobile, and, therefore, showed that his statement to the insurer, upon which it had acted in defending the action for personal injuries, was false. In other words, the court in *Buffalo v. United States Fidelity & Guaranty Co., supra,* held that the facts before it showed that the assured had reported to insurer that he was not in the automobile at the time the accident occurred, that it had defended the action in the state court on that basis, while in the case brought by assured upon the policy the pleadings disclosed that the original statement was false and that the company had been led to defend the action by the false statement and was thereby prejudiced.

In *Hynding v. Home Acc. Ins. Co.* (1932), 214 Cal. 743, 7 P. (2d) 999, the assured's report indicated a good defense, but he refused to attend the trial and to testify in accordance with the report, or to assist in obtaining information and witnesses.

In *Purefoy v. Pacific Auto Indem. Exch.* (1935), 5 Cal. (2d) 81, 53 P. (2d) 155, the assured failed to report the accident to the company until served with summons one year and three months after the accident. The first notice of the accident was a letter from plaintiff's

attorney, received by the insurer three and a half months after the accident.

Appellant cites the case of *Miller v. Union Indemnity Co.* (1924), 209 App. Div. 455, 204 N. Y. Supp. 730, and on page 25 of its brief sets forth what purports to be a quotation from that decision. It is submitted that a careful reading of the decision of the cited case does not reveal the quotation set forth. Presumably the quotation was taken from some other case, the name of which, of course, this appellee has not been advised of and, for that reason, cannot discuss the facts of that case in this brief.

*In all of the cases cited by appellant the insurer had acted upon and had been prejudiced by the false statement of the insured, and the falsity of that statement was shown by his own evidence or statements.*

An insurer is not prejudiced by an untrue statement from the assured unless it is misled by such statement, and where it is not misled the false statement does not operate to release the insurer under the cooperation clause.

*Albert v. Public Service Mutual Casualty Ins. Corp.* (1943), 266 App. Div. 284, 42 N. Y. S. (2d) 124;

*Western Casualty & Surety Co. v. Weimar* (1938) (C. C. A. 9), 96 F. (2d) 635.

This court has had occasion to consider some of the phases of the question raised on this appeal in *Pacific Indemnity Co. v. McDonald* (1939) (C. C. A. 9), 107 F. (2d) 446. In that case the insured guest passenger had been injured while riding in an automobile insured in Pacific Indemnity Company and which was being driven by its insured, McDonald, at the time of the accident.

Upon suit being started by the injured party the insurer commenced an action for declaratory relief, alleging, among other things, that it had been relieved from any liability on the policy because its insured and the injured party were fraudulently conspiring to procure a judgment against the insured and, further, that the insured had breached the conditions of his policy by false statements concerning the accident and failure to cooperate with the insurance company in the defense of the action. In affirming the judgment of the trial court, entered upon the verdict of the jury finding that there was no breach of the cooperation clause of the policy or lack of cooperation or collusion, this court said, at page 447:

> "The appellee McDonald . . . admitted that on August 18, 1936, he had falsely stated that his car had been forced off the road by an oncoming car, but that a week later, on August 25th, he had corrected the statement and had truly stated the facts concerning the accident to the appellant. He denied the charges of collusion and noncooperation."

Further, at page 450:

> "The prompt withdrawal of the falsehood cured the default in the absence of some showing that the company was prejudiced by the delay in telling the truth."

And again, at page 451:

> "At the trial appellee McDonald testified that his statement of August 25th was a true statement. He testified that he did not know whether or not he went to sleep, and that he had 'no recollection of the accident other than the fact that it happened.' Appellee Brune testified that she spoke to him shortly before the accident and he did not answer, although his car

was going faster. The evidence would indicate that appellee McDonald honestly might be quite hazy in his recollection of the facts owing to his loss of sleep and excessive drinking."

And, finally, at page 452:

"It should not be forgotten that even if appellee McDonald had no defense against the charge of intoxication and gross negligence he nevertheless was entitled to have the assistance of the appellant upon the issue of damage."

Even though it be true that under the law of Oregon, where the cited case arose, the insurer is required to show prejudice before it could establish a breach of the cooperation clause of the policy, this appellee submits that the comments of the court set forth are pertinent to the case at bar. In the cited case the insured admitted that his first statement was false but a week later he corrected it and truly stated the facts concerning the accident. *In the case at bar White at no time gave a false statement,* he merely amplified or explained his original statement when he advised appellant that he may have fallen asleep and that the accident may have happened at that time. This explanation was made a few days after the accident, and, more important, *before* appellant had done anything that would subsequently affect its position in the defense of the state court actions.

C. California Law Allows Twenty Days to Give Notice.

It is undisputed that the appellant received an oral report from White of the fact that the accident had occurred within *two* days following its occurrence, and a sworn statement was given by him *three* days after the accident, and appellant was advised of all of the facts and circumstances surrounding the accident in so far as known to White prior to his entering a plea of guilty to the criminal charge *eleven* days after the accident occurred. Under the law of the State of California, which was a part of the policy as much as if it had been printed therein, it is provided as follows:

> "Except in the case of life, marine, or fire insurance, notice of an accident, injury, or death may be given at any time within twenty days after the event, to the insurer under a policy against loss therefrom. In such a policy, no requirement of notice within a lesser period shall be valid."
>
> *Insurance Code of the State of California,* Section 551; Calif. Stats. 1935, Ch. 145, Sec. 551, p. 510.

It is clear that appellant received from White everything to which it was entitled concerning the happening of the accident well within the time prescribed by the law of the State of California.

In view of this fact, how can it be said that White breached the cooperation clause of appellant's policy? It knew all of the facts which it now claims conclusively proved that White was awake, and was fully advised as to

every fact concerning the accident which would enable it to make the determination whether to defend or settle long before an answer to the state court actions was prepared and less than twenty days after the accident.

This case is on its facts entirely different from any reported case. Prior hereto no insurer has sought to escape liability under its cooperation clause, except in cases where it has *acted to its prejudice* upon a misstatement by insured and he has either withdrawn that statement or has given testimony which in itself proved the falsity of the statement to his insurer and upon which it had acted.

This appellee directs the court's attention to the fact that the defense of breach of the cooperation clause has been denied by the courts in many cases where the factual situation was much more favorable to the insurer than are the facts in the case at bar.

*Pacific Indemnity Co. v. McDonald* (1939) (C. C. A. 9), 107 F. (2d) 446, *supra;*

*Western Casualty & Surety Co. v. Weimar* (1938) (C. C. A. 9), 96 F. (2d) 635, *supra;*

*Ocean Accident & Guarantee Corp. v. Lucas* (1934) (C. C. A. 6), 74 F. (2d) 115;

*Associated Indemnity Corporation v. Davis* (1943) (C. C. A. 3), 136 F. (2d) 71;

*Rockmiss v. New Jersey Mfgrs. Ass'n Fire Ins. Co.* (1934), 112 N. J. L. 136, 169 Atl. 663;

*Albert v. Public Service Mutual Casualty Ins. Corp., supra* (1943), 226 App. Div. 284, 42 N. Y. S. (2d) 124.

In *Porter v. Employers' etc. Corp., Ltd.* (1940), 40 Cal. App. (2d) 502, 104 P. (2d) 1087, the court says, at page 515:

> "Certainly an insured cannot be charged with lack of cooperation simply because of minor variances in her various statements. It would be most startling indeed if such variances did not occur. Moreover, unintentonal and accidental mistakes in statements made by the insured do not violate the cooperation clause."

White still maintained that he knew none of the facts of the accident. Was appellant's position in any wise changed or prejudiced because of this clarification? Would its opportunity to investigate and dispose of the claims have been better if White had told a representative of appellant the first time he talked to him that he may have fallen asleep and the accident may have occurred at that time, although he knew none of the facts of the accident? Certainly not. Appellant, although having the opportunity, makes no attempt whatsoever to show that it was in fact misled or prejudiced. It cannot show that. There has been no breach of the cooperation clause.

## Conclusion.

It is respectfully submitted that the evidence is clear and amply sufficient to demonstrate that White did not breach the cooperation clause of appellant's policy but to the contrary, fully cooperated with appellant in every way requested and that appellant, long before it took any action and within eleven days after the happening of the accident, not only was fully advised by White as to all facts within his knowledge but through an independent and complete investigation had determined that the automobile it insured and which was driven by White was the one involved in the accident resulting in the death of the two pedestrians.

It is submitted that the judgment should be affirmed in its entirety.

Respectfully submitted,

JONES, THOMPSON & KELLY,

By EVERETT W. THOMPSON,

*Attorneys for Appellee Standard Accident Insurance Company of Detroit, a Corporation.*